SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-70

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 456,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 456,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Westinghouse Electric Corporation ("Westinghouse") hereby seeks review by writ of certiorari of a judgment of the United States Court of Appeals for the Second Circuit entered April 26, 1971 (rehearing denied June 9, 1971) granting enforcement of a decision and order and a supplemental decision and order of the National Labor Relations Board ("Board") "clarifying" a unit it had found to be appropriate in 1950 and 1956, and requiring Westinghouse to bargain with Respondent International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 456 ("the IUE") as the collective bargaining representative of seven Systems and Procedures Analysts ("Analysts") of Petitioner at its Jersey City Works, without benefit of an election. The Board dragooned those employees into the IUE's unit without affording them any opportunity to express their wishes with respect to union representation and notwithstanding that

(1) the Board, in its decisions in 1950 and 1956, had expressly excluded the precursor of the Analysts (a "Staff Assistant") from the unit it found to be appropriate;

(2) the IUE, for more than ten years, made no demand that Westinghouse bargain with it respecting the Analysts or their predecessors;

(3) the Board repeatedly has held that either of the foregoing considerations precludes it from expanding the unit by "clarification";

(4) the controlling statute *requires* an election by secret ballot when "a question of representation" arises;

(5) the IUE, by filing a petition to "clarify" the unit instead of a charge alleging a refusal by Westinghouse to bargain concerning the Analysts, tacitly admitted that such a question existed;

(6) the Regional Director of the Board, in ruling on the petition to clarify, said that the Union's claim presented a "close question";

(7) the Board itself said the issue was "substantial";

(8) as Judge Moore observed in his concurring opinion in the court below,

> "When the relevant considerations are not free from doubt it would seem more satisfactory to resolve such close questions through the election process rather than by seeking an addition of new employees by a finding of accretion.";

(9) the controlling statute does not expressly or by implication authorize the Board, by a device of its own creation, to force an employer to recognize a union as his employees' exclusive representative without an election, without any showing whatsoever that any of the employees wish it to represent them and without even a claim that the employer had engaged in any independent unfair labor practice; and, finally,

(10) the Analysts, as professional employees, were, in any event, entitled to a self-determination election as to whether or not they would be included with non-professional employees. National Labor Relations Act, as amended, 49 Stat. 453, as amended, 29 U. S. C. §§ 151 et seq. (the "Act") § 9(b)(1).

Opinions Below

The opinion of the Court of Appeals (10a)[1] is reported officially at 440 F. 2d 7 and unofficially at 76 LRRM 2986 and 65 CCH Lab. Cas. ¶ 11633. The Board's Decision and Order (25a) is reported officially at 177 NLRB No. 49 and unofficially at 71 LRRM 1496 and 1969 CCH NLRB Dec. ¶ 21039; its Supplemental Decision and Order (22a) is reported officially at 182 NLRB No. 85 and unofficially at 74 LRRM 1204 and 1970 CCH NLRB Dec. ¶ 21897. The Board's Decision on Review in the unit "clarification" case (38a) is reported officially at 173 NLRB No. 43 and unofficially at 69 LRRM 1332 and 1968-2 CCH NLRB Dec. ¶ 20268. The Regional Director's Decision and Order "clarifying" the unit (42a) has not been reported, officially or unofficially.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1971 (58a). On June 9, 1971, the Court of Appeals issued an order denying Westinghouse's petition for a rehearing (60a). On June 28, 1971, the Court of Appeals issued an order pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure staying until July 16, 1971, the issuance of its mandate pending Westinghouse's application to this Court for a writ of certiorari.

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[1] Numbers in parentheses followed by "a" refer to pages of the Appendix to this Petition. Numbers in parentheses preceded by "A" refer to pages of the Joint Appendix in the Court of Appeals. References to Westinghouse's exhibits are prefixed "Emp. X" and references to the IUE's exhibits are prefixed "PX." All references to exhibits are followed by a reference to the Joint Appendix.

This Court has jurisdiction to review the judgment in question under Section 1254(1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1), and Sections 10(e) and 10(f) of the Act.

Questions Presented for Review

This case presents the following questions for review:

1. Did the Board violate Section 9(c)(1) of the Act, which requires resolving questions of representation "by secret ballot," in ordering Westinghouse to recognize and bargain with the IUE concerning the seven Systems and Procedures Analysts without a showing of interest, without an election, and without an independent unfair labor practice by Westinghouse, and without any claim by the IUE over a period of more than ten years that it represented said Analysts, on the sole ground that the Analysts were part of a unit for which the Board certified the IUE as bargaining representative in 1956, from which the Board had excluded the Analysts' precursor?

2. Did the Board violate the rights of the Analysts under Section 9(b)(1) of the Act by including them in a unit of non-professional employees that the Board had found to be appropriate more than ten years before?

The case thus presents a most important question concerning the authority of the Board to add employees to an established collective bargaining unit in the guise of "clarifying" the unit—a procedure that has no statutory basis, particularly where, as here, both the Board and its Regional Director seemed doubtful of the propriety of using the procedure. The Board's changing bargaining units by "clarifying" them has been increasing. In the past five years, its using the procedure has increased 280 percent. 34 NLRB Ann. Rep. 196 (1969); 30 NLRB Ann. Rep. 177 (1965). Hence, this question vitally concerns the Board's proper administration of the Act, and this Court's answer to the question will determine whether the Board may arbitrarily

deprive many thousands of employees of their statutory right to vote for or against having a union as their exclusive representative.

This Court has never passed on this question. *Carey* v. *Westinghouse Elec. Corp.*, 375 U. S. 261 (1964) was an action to compel arbitrating a jurisdictional dispute. It did not involve a petition to clarify a unit. In a dictum, this Court assumed, without deciding (since the issue was not litigated), that the Board had authority, in a dispute between two rival unions, each representing employees in separate bargaining units, to "clarify" the unit of each union. There, the disputed employees in each unit *had voted* in favor of bargaining collectively. Here, the disputed Systems and Procedures Analysts and their predecessors have had no opportunity to vote for or against bargaining collectively, and thus have not had the right that Section 7 of the Act guarantees to them, i.e., "to refrain" from collective activities.

A second question, fundamental to the Board's administration of the Act, demands this Court's attention. Both the Board and the United States Court of Appeals for the Second Circuit have held here that Systems and Procedures Analysts are not professional employees within the meaning of Section 2(12) of the Act. Implicit in these holdings is the assumption that expanding scientific knowledge and science cannot create new professions. If this Court does not correct this assumption, the Board's ruling will drastically curtail the right that Section 9(b)(1) of the Act affords to professional employees, to determine for themselves whether they wish to be represented in one bargaining unit with non-professional employees. The Administrator of the Wage and Hour Division of the United States Department of Labor has held hearings with respect to the professional status of employees in the data processing field. *Notice of Hearing*, 35 Fed. Reg. 14268 (1970). Hence, this Court's ruling on this issue will affect the administering of the Act, as well as the administrating of the Fair Labor Standards Act.

Statutes and Regulations Involved

The statutes and regulations that this case involves are Sections 2(12), 7, 9(b), 9(c)(1), 10(c) and 10(f) of the National Labor Relations Act, as amended [61 Stat. 137, 140, 143, 49 Stat. 453, 29 U. S. C. 152(12), 157, 159(b), 159(c)(1), 160(c) and 160(f)], Sections 102.67(b), 102.67(c), 102.67(d) of the Rules and Regulations of the National Labor Relations Board (29 C. F. R. 223) and Sections 101.18(a), 101.18(b) and 101.18(c) of the Statements of Procedure of the National Labor Relations Board (29 C. F. R. 202). They are set forth verbatim in Appendix A, which is annexed hereto.

Statement of the Case

Westinghouse asks the Court to review a judgment of the Court of Appeals for the Second Circuit enforcing orders of the National Labor Relations Board[2] on the basis of a Board decision "clarifying" (as distinguished from amending) the description of a bargaining unit in a proceeding of the Board's own creation that no statute expressly or impliedly authorizes and that this Court has not, in the circumstances of this case, sanctioned or approved. In rendering its judgment, the Court below had jurisdiction under Sections 10(e) and 10(f) of the Act.

(a) *History of the Proceedings.* This case began in 1967, when the IUE asked the Board to "clarify" a unit of "[a]ll office, clerical and technical employees" for whom the Board in 1950 (89 NLRB 8) and later in 1956 (116 NLRB 1545) had certified it as collective bargaining representative, by adding employees classified as Analysts

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[2] 182 NLRB No. 85 (1970) (22a); 177 NLRB No. 49 (1969) (25a).

and certain other employees. After a hearing, the Board's Acting Regional Director for Region 22 issued an Order adding the Analysts to the bargaining unit (42a). He rested this Order on his view, as to which he seemed doubtful, that the case did not present a question of representation and on his further view that the Analysts are neither professional nor confidential employees but are "technical" employees within the meaning of the 1956 certification, and that he could include them in the unit of 1956 without allowing them to vote in a self-determination election (49-51a).

Westinghouse then, pursuant to Section 102.67(b)-(d) of the Board's Rules and Regulations, requested the Board to review the Acting Regional Director's rulings on these issues (A205). The Board granted the request only with respect to the Acting Regional Director's ruling that the Analysts, as technical employees, "may be accreted to the existing unit of office, clerical and technical employees by way of unit clarification" (A224). The Board, although conceding that the issue was substantial, affirmed this part of the Order, holding that the Systems and Procedures Analysts "are an accretion to" the certified unit "and that unit as clarified includes" the Analysts.[3] The Board denied Westinghouse's motion for reconsideration.

In order to obtain judicial review of the validity of the Board's holding that it could add the Analysts to the unit as an "accretion", Westinghouse refused to bargain with the IUE concerning these employees. The Board's General Counsel issued a complaint by reason of this refusal (A232). Westinghouse answered (A237, 239, 240), and the General Counsel moved for summary judgment (A241), which the Board granted.[4]

Westinghouse then petitioned the Court of Appeals for the Second Circuit for review. The IUE moved for leave

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[3] 173 NLRB No. 43 (1968) (38a).

[4] 182 NLRB No. 85 (1970) (22a); 177 NLRB No. 49 (1969) (25a).

to intervene, which the Court granted. The Board cross-petitioned for enforcement. The Court of Appeals denied Westinghouse's petition for review and granted the Board's cross-petition for enforcement (58a).

(b) *Description of the Bargaining Unit.* Westinghouse manufactures elevators at its Jersey City Works pursuant to contracts with its customers (A14-15). Since 1956 and before, Westinghouse has recognized the IUE as the exclusive collective bargaining representative of a unit of approximately 315 salaried employees (A14) with the following exclusions, among others:

> "All office, clerical, and technical employees of Westinghouse . . . Jersey City Works . . . but excluding all staff assistants to department managers or . . . professional employees. . . ."[5]

(c) *History of the Systems and Procedures Analyst Classification.* Westinghouse began using IBM data processing equipment at its Jersey City Works in 1956 (A27). In November 1956, it hired Neil Conohan as a "Staff Assistant" to a department manager, to investigate the capabilities of the IBM equipment and to plan converting clerical work to IBM procedures (A29-30). The express terms of the unit description in the Board's certification in 116 NLRB 1545, 1549 (1956) excluded him and other employees so classified from the bargaining unit (A29-30).

Mr. Conohan's first project, from late 1956 to late 1957, was to develop a system using IBM equipment for record-keeping in the inventory control department (A32). He "developed a system by which [Westinghouse] could mechanize . . . the performance of this job . . . to eliminate . . .

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[5] The Board first certified the IUE as representative of the unit in question in 1950 (A15; 89 NLRB 8) and Westinghouse since then has recognized it and has entered into successive contracts with it. (Emp. X5, A152; Emp. X7A, A156; Emp. X7B, A158; Emp. X7C, A160; Emp. X1, A141; Emp. X6, A154; Emp. X8, A162; Emp. X2, A144).

manual posting" (A32). He also developed a system during 1957 to determine the dollar value of inventories in the inventory control department at the end of each month (A33). During his first two years with Westinghouse, Mr. Conohan also developed a system to determine the efficiency of labor performing maintenance work for customers, a system to determine the best times to reorder materials and the most economical quantities in which to order, and a procedure to prepare payrolls that replaced manual adding machines (A35-36).

Because Mr. Conohan's systems work dealt largely with electronic data processing, Westinghouse, in 1957, changed his title from "Staff Assistant" to "Programmer" (A37-38). His basic duties, however, did not change. Those duties were to work with other departments to "develop systems and procedures . . . to convert existing clerical operations . . . to tabulation" (A37-38; Emp. X11, A164).

On August 1, 1959, Westinghouse assigned a Mr. Cronin, who was a Data Processing Machine Operator, to perform duties like Mr. Conohan's (A34, 82). Mr. Cronin was classified as a "Programmer B" (A39; Emp. X13, A169). Mr. Conohan became a "Programmer A" (A38; Emp. X12, A166). The work of the Programmer A expanded to include such duties as thoroughly analyzing operations of various departments at the Jersey City Works in order to coordinate them in one tabulating program and to eliminate duplicating operations that were common to two or more departments (Emp. X12, A166).

In 1959, the data processing systems and procedures that Programmers developed had grown to a point that required Westinghouse to augment its existing equipment (A40). In 1961, Westinghouse acquired an IBM 1401 computer (A43, 56-57).

The increased capacity and versatility of computers led to greater responsibility and more duties for the employees whom Westinghouse then classified as Program-

mers. The computers now handled work not only of the Accounting Department but also accumulated information with respect to sales billings and the cost of sales, and produced composite reports that managers in the field department, regional managers, and headquarters managers used (A44).

On July 1, 1961, Westinghouse changed the title of the Programmers to "Data Processing Methods and Systems Analysts" and adopted new job descriptions that more accurately reflected the expanded scope and duties of their work (A44-45; Emp. X14, A172; Emp. X15, A175). The Analysts continued to conduct independent investigations across departmental lines in order to create new systems, to determine their adaptability to electronic equipment, to install them, and to train other employees to use the new systems they created (A45). The Analysts also prepared reports and made recommendations concerning manpower requirements and work assignments (A64-65; Emp. X3, A146; Emp. X4, A149).

On August 1, 1965, Westinghouse again reclassified these employees as "Systems and Procedures Analysts" and issued new job descriptions (A49; Emp. X3, A146; Emp. X4, A149) to reflect the increased complexity and added duties of their work since 1961 (A49).

(d) *Bargaining History.* In 1950, the Board first certified the IUE as the exclusive collective bargaining representative of "[a]ll office, clerical, and technical employees of [Westinghouse's] Jersey City Works" with certain exceptions. *Westinghouse Elec. Corp.*, 89 NLRB 8, 35 (1950). The Board recertified the IUE in 1956. *Westinghouse Elec. Corp.*, 116 NLRB 1545 (1956).

Between the date of the IUE's first certificate and the date the IUE petitioned the Board to "clarify" its unit by adding the Analysts, Westinghouse and the IUE have entered into National Labor Agreements covering numerous bargaining units, including the Jersey City Works, in 1950, 1956, 1960, 1963, and 1966 (A6-7, 15-16; Emp. X1, A141;

Emp. X5, A152; Emp. X7A, A156; Emp. X7B, A158; Emp. X7C, A160). In addition, the parties negotiated local agreements covering only the bargaining unit this case involves, in 1951, 1965, and 1966, the last of which resulted from a two-week strike at the Jersey City Works (A7, 16-17, 108; Emp. X2, A144; Emp. X6, A154; Emp. X8, A162). The parties engaged in many other bargaining sessions between those that led to their executing national and local agreements (A17-18).

It is highly significant that the IUE did not claim to represent systems people in any of these bargaining sessions. Indeed, it did not seek to represent these employees until August 8, 1967, when it filed its petition to "clarify" the bargaining unit, which instituted the present case (A3, 18). The IUE did not bargain for these people or try to force Westinghouse to bargain concerning them as it could have done, not only during the numerous local bargaining sessions between 1951 and 1965, but also during the negotiations leading to the three National Labor Agreements of 1960, 1963, and 1966, and the two Local Supplements of 1965 and 1966 (A17-18, 22, 29, 103-104, 106). Westinghouse and the IUE did not discuss the status of the Systems and Procedures Analysts while negotiating the 1966 Local Supplement or thereafter (A22). *Thus, during the ten and one-half years, starting with Mr. Conohan in 1956, that employees at the Jersey City Works were doing systems work of an increasingly important, complex and demanding nature, the IUE laid no claim to the employees it now seeks to dragoon into the bargaining unit.*

In June 1965, Anton Handel, the IUE's President, spoke to Leonard R. Casner, the Industrial Relations Manager at the Jersey City Works, about them and later wrote to him (A13-14, 20, 102; PX1, A135), asking why Westinghouse had placed them and *more than 40 other employees* "outside the scope of [the] bargaining unit" (PX1, A135). Messrs. Casner and Handel discussed the matter again on June 10, 1965 (A102). Mr. Casner *promptly* told Mr. Handel the Systems and Procedures Analysts and the 40 others were

professionals and offered to make job descriptions available to the IUE for review (PX3, A138). It did so a short time later (A108). *Still, in both national and local negotiations thereafter, leading to the agreements of 1966, the IUE did not claim to represent the Analysts.*

(e) *The Educational Requirements for Systems Work.* Westinghouse gradually increased the educational requirements for its systems work as the work grew in complexity and broadened in scope.

On December 1, 1957 (A37), Westinghouse required four years of high school, and up to one year of specialized instruction in using and operating tabulating machines and auxiliary equipment, training that the suppliers of the equipment provided (Emp. X11, A164). In 1961, Westinghouse required a college degree in business administration or business management or the equivalent of the degree in experience, and data processing and systems training (Emp. X14, A172; Emp. X15, A175). In 1965, Westinghouse eliminated the requirement of data processing and systems training but kept the requirement of a college degree in business administration or business management or its equivalent (Emp. X3, A146; Emp. X4, A149).

(f) *Educational and Employment Backgrounds of the Systems and Procedures Analysts.* The Jersey City Works employed seven Analysts at the date of the hearing (A71). Two of them were college graduates (A131)—one with a bachelor of science degree in business administration from Seton Hall University (Emp. X16B, A181), and the other with a bachelor of arts degree in mathematics from Fisk University (Emp. X16D, A184). Each of the other five had attended college for from one to more than two years and, of these, four, at the time of the hearing, were taking college courses leading to a business administration degree (A129-133; Emp. X16A, A179; Emp. X16C, A183; Emp. X16E, A185; Emp. X16F, A186; Emp. 16G, A188). Each of the five Analysts who were not college graduates had special, formal business machine training at IBM and military service schools, and three of them had, respectively,

three, four, and four and one-half years of related work experience (A129-134; Emp. X16A, A179; Emp. X16E, A185; Emp. X16F, A186).

Westinghouse promoted four of the Analysts from bargaining unit jobs as data processing machine operators, one from electrical draftsman, and another from engineering draftsman (A71-75). Another Analyst, Mr. Billes, became a Systems and Procedures Analyst after he completed Westinghouse's student training program (A75).

Westinghouse promoted two former Systems and Procedures Analysts to that position from jobs as Methods Engineers. The Board had held the Methods Engineers to be professional employees and had excluded them from the IUE's unit (A78). *Westinghouse Elec. Corp.*, 89 NLRB 8 (1950).

ARGUMENT

I.

The Board Violated Section 9(c)(1) of the National Labor Relations Act, As Amended, in Ordering Westinghouse to Recognize and Bargain With the IUE Concerning Systems and Procedures Analysts (Whose Precursor it Excluded from the Unit in 1956), Without a Showing of Interest, Without an Election, Without an Independent Unfair Labor Practice by Westinghouse, and Without any Claim by the IUE for More than Ten Years That it Represented the Analysts, on the Sole Ground That They Are Part of a Unit of Employees for Whom the Board Had Long Before Certified the IUE.

A. Because the "Staff Assistant" whom the Board excluded from the unit in 1956 performed functions that Systems and Procedures Analysts now perform, the Board may not properly add the Analysts to the unit without giving them a chance to vote.

On November 7, 1956, the Board directed a representation election among "[a]ll office, clerical, and technical em-

ployees [at Westinghouse's Jersey City Works], but excluding staff assistants to department managers . . .'"[6] The IUE won the election and the Board certified it. Mr. Conohan, whose classification then was "Staff Assistant," was not in the unit (A30, 83).

From the date of his hire, Mr. Conohan's duties were similar to those the Systems and Procedures Analysts now perform (see pp. 8-10, *supra*), but they were less complex and more limited in scope than those of the present Analysts. Mr. Conohan independently devised new systems and adapted old ones for data processing equipment. The present Systems and Procedures Analysts independently devise new systems and revise old ones for the more complex, far more sophisticated equipment that Westinghouse has acquired since 1956 (Emp. X3, A146; Emp. X4, A149; A42-44). The basic function has not changed, although the work of the Analysts relates to computers rather than to the comparatively simple equipment Westinghouse had in 1956. In 1956, Mr. Conohan's duties were to "explore the feasibility of" converting "clerical procedures . . . to procedures that would . . . use . . . various types of IBM . . . equipment" (A30). In 1967, the Analysts' duties were, among other things, "to assist various departments in planning, formulating and developing systems and procedures . . . utilizing [IBM] computers" (Emp. X4, A149-50). Thus, like the Staff Assistant in 1956, the Analysts today must use independent judgment to determine the adaptability of electronic data processing equipment to new and changed systems.

The Board itself has consistently held, contrary to its holding here, that if the functions of employees a union seeks to represent existed when it certified the union, it may not and will not add those employees to the existing unit without giving them an opportunity to vote in a repre-

[6] 116 NLRB 1545 (1956).

sentation election.[7] This rule has added force where, as here, the union and the employer over a period of many years have negotiated labor contracts and the union has not claimed or attempted to represent the employees it seeks to add to the unit without an election. In one of its more recent decisions on this point, the Board said:

> "[*I*]*t is well settled* that a group of employees . . . in existence when the unit was established and historically excluded from contract coverage, and particularly where . . . they possess a sufficient separate community of interest to constitute a separate appropriate bargaining unit may not be included in the unit as an accretion unless the employees have consented, normally through the procedures of a Board election, to be represented by a single bargaining agent in common with the [represented] employees of the employer." *San Jose Motel,* 174 NLRB No. 148, 70 LRRM 1378, 1379 (1969) (emphasis added).

Accord, *Brockton Taunton Gas Co.,* 178 NLRB No. 60, 72 LRRM 1110 (1969) ("category" antedated "the advent of the Union" and the employer denied the union's attempt during negotiations to add them); *Ladish Co.,* 176 NLRB No. 150, 71 LRRM 1363 (1960) (classifications existed before certification and later contracts excluded them); *Beaunit Fibers, Inc.,* 153 NLRB 987, 989 (1965) (job functions existed "at the time of the Board certification"); *Sterilon Corp.,* 147 NLRB 219 (1964) (job functions existed before certification);[8] *Standard Oil Co.,* 146 NLRB 1189 (1964) ("categories" antedated certification); *Westinghouse Elec. Corp.,* 142 NLRB 317 (1963) (classification existed before certification and contracts executed after certification did not include classification).

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[7]The Board requires a union to present evidence that it has been designated by at least 30% of the employees it seeks to represent before the Board will conduct a representation election. *NLRB Statements of Procedures* § 101.18(a)(b). The IUE has made no such showing of interest in this case. In like cases, the Board dismisses the representation petition. *Id.* § 101.18(c).

[8] In *Sterilon,* the Board refused to add the disputed employees to the unit even though they shared a community of interest with represented employees.

The Board tried in the instant case to explain its departing from its own precedents by its finding that the functions the "Staff Assistant" performed differed substantially from those that the Systems and Procedures Analysts perform. The evidence here clearly shows that the functions of the present Analysts *include the functions of the Staff Assistant of 1956*, but are of a higher order. The Board in these circumstances certainly should not have added the Analysts to the bargaining unit as an accretion. In *Aluminum Co. of America*, 146 NLRB 929, 930 (1964), the Board refused to add to the unit a *procedure analyst* who revised procedures, inasmuch as it had excluded from the unit an *accountant* who revised procedures when it certified the union. There is no evidence, substantial or otherwise, that the work of Analysts does not include the work of the Staff Assistant whom the Board excluded in 1956.

B. The indisputable fact that the IUE did not seek to include Westinghouse's systems men in the unit or to bargain for them in the 1960, 1963, 1965, and 1966 negotiations precludes including them now without an election.

Even if the Board were correct in finding that the Systems and Procedures Analysts' functions in their expanded form did not exist until after it certified the IUE in 1956 [173 NLRB No. 43 at 3 (40a)], the Board departed from its own precedents in holding that these employees are an accretion to the certified unit. Except in this case, *the Board has consistently held that there must be an election before it may add employees in new classifications to a unit if the new classifications existed before the negotiation of the latest labor agreement and the union did not try to bargain for employees in the new classifications.* Thus, in *Worthington Corp.*, 155 NLRB 222 (1965), a case in which the facts closely parallel the facts that the Board itself found in the present case, the Board refused to add

systems and procedures analysts to an office, clerical and technical unit.[9] It emphasized the facts (1) that

> " . . . the systems and procedures analysts . . . [were] engaged in work that [was] completely new to the plant, namely, devising procedures and systems for the newly acquired 1440 computer,"

(2) that they were

> "not engaged in work which was previously performed at the time of the certification in 1951;"

and (e)

> "that the Petitioner did not claim to represent or attempt to bargain for these employees during the contract negotiations in August 1964, sometime after the jobs involved in this proceeding were established." 155 NLRB at 227.

"Considering these factors, along with the differences in [the analysts'] job function, responsibilities, and use of initiative and judgment" as distinguished from that of employees in the unit, the Board, in *Worthington*, found that the systems and procedures analysts could not be regarded as an accretion to the existing unit. 155 NLRB at 227. Accord, *Bethlehem Steel Corp.*, 172 NLRB No. 32, 68 LRRM 1331 (1968) (union did not claim Programmers for six years); *Gould-Nat'l Batteries, Inc.*, 157 NLRB 679 (1966) (union did not claim employees in negotiating last contract); *Industrial Siderurgica, Inc.*, 147 NLRB 975 (1964) (latest contract did not cover employees union sought).

Here the Board not only disregarded its own precedents but also failed to cite any authority to support its including the Analysts in the bargaining unit without giving them a chance to vote. These facts, taken together, emphasize the arbitrary and capricious nature of the Board's ruling.

The Board tried to justify its ruling on three grounds:

(1) That "[t]he disputed classifications did not reach a job content approaching the present form until 1961 and

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[9] The Board had previously decertified the union as the representative of certain technical and engineering employees. 155 NLRB at 223.

. . . the present [job] description . . . and [job title] were not arrived at until 1965." 173 NLRB No. 43 at 3 (40a).

(2) That Westinghouse did not make a timely reply to the IUE's 1965 request (PX 1, A135) "for information concerning the unit placement of these jobs." *Ibid.* (41a).

And (3) That "4 of the 7 [Systems and Procedures Analysts] were formerly employed on unit positions" *Ibid.* (41a).

As to "job content," the evidence clearly shows that the basic elements existed in 1961 and before. See pp. 8-10, *supra*. Another obvious answer to the first ground is that the parties negotiated one National Agreement and two Local Supplements, one of which involved a two-week strike, *after* Westinghouse established the *current* job description and job title (Emp. X1, A141; Emp. X2, A144; Emp. X8, A162), *but the IUE did not thereafter attempt to bargain for the Systems and Procedures Analysts or show any interest in representing them in any negotiating session.*

As to the Board's second ground, the IUE's President admitted that eight days after he wrote to Mr. Casner asking why the Analysts and others were not in the unit, Mr. Casner said it was because they were professional employees (A107). In any event, Westinghouse's alleged "delay" in complying with the IUE's request for information could not have prevented the IUE from claiming to represent the Analysts. If the Union believed it really needed the information quickly, it could have filed an unfair labor practice charge because of the alleged delay. Furthermore, the IUE did not try to bargain for the Analysts or to include them in the unit in negotiating two agreements in 1966, *after* Westinghouse had furnished the Analysts' job descriptions to the Union.

Finally, the fact that Westinghouse promoted four of the seven Systems and Procedures Analysts from the bargaining unit does not justify returning them, as well as their three colleagues, to the unit. *Douglas Aircraft Co.*, 147 NLRB 920, 924 (1964) (no accretion although unit employees transferred to nonunit jobs).

Notwithstanding the Board's labored efforts to rationalize its Decision on Review, that Decision is so inconsistent with its own prior rulings in like cases that it is arbitrary and capricious, and this Court should set it aside. *Retail Clerks, Local 1325* v. *NLRB,* 414 F. 2d 1194, 1201 (D. C. Cir. 1969).

> "[T]his Court must review, on an *ad hoc* basis, the fairness of the Board's application of its chosen standard." *Home Town Foods, Inc.* v. *NLRB,* 416 F. 2d 392, 395, 400 (5th Cir. 1969)

The Board's departure from "its chosen standard" here is not only "unfair," but is without cited precedent, without reason, without evidentiary support, and is both arbitrary and capricious. For this reason, if for no other, this Court should vacate the judgment of the Court of Appeals enforcing the Board's order directing Westinghouse to bargain with the IUE as the exclusive representative of the Systems and Procedures Analysts.

C. The Regional Director, the Board, and the Union itself, all have in effect admitted that a question of representation, the determining of which calls for an election by secret ballot, exists in this case.

The statutory command that has compelled the Board consistently to refuse, in circumstances like those present here, to force employees into a union without giving them a chance to vote, appears in section 9(c)(1) of the Act as follows:

> "Whenever a petition shall have been filed . . . by . . . any . . . labor organization . . . alleging that a substantial number of employees . . . wish to be represented for collective bargaining[10] and that their employer declines to recognize their representative as the representative [selected by the majority of the employees] . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation . . . exists shall provide

[10] The record here does not even include any such allegation, or other evidence that the Analysts wish to be represented.

> for an appropriate hearing upon due notice . . . If the Board finds upon the record of such hearing that such a question of representation exists, *it shall direct an election by secret ballot* and shall certify the results thereof." (Emphasis added)

A question of representation exists (a) where, as here, the functions of the employees whom a union seeks to add to its unit existed when the Board certified the union, or (b) where, as the Board itself found in this case, the employees are in a new classification that the employer established after the certification and the union repeatedly has failed to try to bargain for employees in that classification during contract negotiations. The Board has recognized these principles time and time again.

Thus, in *Beaunit Fibers, Inc., supra,* the Board refused to give the employees to the union without an election because:

> "The functions of cleaning and sanding bobbins and of copper dissolving, deironing, and filtration were in existence at the time of the Board certification in 1952. At that time these functions were being performed by former supervisors who had become production employees. After the certification until the present time, this work had been performed by salaried production employees. The Petitioner made no effort to represent these employees until 14 years after the Board certification. Neither the contract executed pursuant to the certification nor any subsequently executed contracts include salaried production employees . . .
>
> "In view of the foregoing and upon the entire record, *we find that the petition for clarification raises a question concerning representation which may not be resolved through a clarification of the existing unit. The proper procedure is a petition pursuant to Section 9(c) of the Act seeking an election.*" 153 NLRB at 989 (emphasis added).

Similarly, in *Sterilon Corp., supra,* the Board held that a question of representation existed where the union sought

to add to its unit without an election shipping and receiving employees, even though these employees had "interests and conditions of employment similar to those employees now represented by the [union]." 147 NLRB at 221. The Board rejected the union's attempt to force these employees into the unit because:

> "The function, but not the classification, of shipping and receiving was in existence prior to the Board-conducted election in 1953. At that time the function was performed by a supervisor in the watch strap manufacturing division and a stockboy. After the certification this function was performed by a separate department. The Petitioner made no effort to represent these employees until approximately 11 years after the Board certified the production and maintenance unit. Neither the contract executed pursuant to the certification, nor any subsequently executed contract, includes the function or classification of shipping and receiving . . .
>
> "In view of the foregoing, and upon the entire record, *we find that the motion for clarification raises a question concerning representation which may not be resolved through a clarification of the existing unit. The proper procedure is a petition pursuant to Section 9(c) of the Act seeking an election.*" 147 NLRB at 221 (emphasis added).

Recently, and consistently with its prior holdings, the Board found a question of representation to exist in *Mountain States Tel. Co.*, 175 NLRB No. 91, 71 LRRM 1022 (1969) where the union, which had bargained with the employer since 1911, sought to add to its unit without an election employees in a clerks' classification that the employer established in 1937. The union's failure to try to bargain for the clerks required the Board to "conclude that the existing contractually agreed upon bargaining unit cannot be expanded to include the clerks by way of a petition for clarification. *The petition raises a question concerning representation which cannot properly be resolved in the [unit clarification] proceeding now before us,* and must, therefore be denied." 71 LRRM at 1023 (emphasis added).

In its Decision on Review in the present case, the Board, without citing authority, ignored the existence of a question of representation and violated Section 9(c)(1) of the Act by forcing the Analysts into the IUE's unit without giving them a chance to vote. 173 NLRB No. 43 at 4 (41a). It did this notwithstanding that both the Acting Regional Director and the Board seemed to entertain substantial doubts about the propriety of adding the Analysts to the existing unit on the assumption that the case does not present a "question of representation." The Acting Regional Director conceded that this issue presented a "close question" (51a). The Board, in granting in part Westinghouse's Request for Review, called the issue "substantial" (A224). In these circumstances, the Act's guarantee to employees of the "fullest freedom" [Act § 9(b)] in choosing or rejecting bargaining representatives clearly required the Acting Regional Director and the Board so to resolve their doubts as to uphold the statutory rights of the employees, not the "right" of the IUE, which no statute explicitly or implicitly creates, to force employees, apparently against their will and certainly without any evidence of their consent, to accept the IUE as their exclusive bargaining agent (even to the exclusion of themselves).

Where a question of representation exists, "an employer can insist on a secret ballot election, unless, in the words of the Board, he engages 'in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.' " *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 600 (1969). There is no claim here that Westinghouse did so.

We concede that the Board has power to correct obvious mistakes in its decisions, such as mathematical errors, incorrect designation of a plant's location or a mistaken job title of employees a unit includes, and the Board has always exercised this power. But in 1964 it adopted a new device, the "petition for clarification" of a unit under which it here seeks to subject to a union's discipline employees whom it

previously excluded or who perform new and different duties in new and different departments.

It is a contradiction in terms to say, on the one hand, as the Union did in this case, that the composition of a unit is so doubtful as to require "clarification," and to hold, on the other hand, as the Board did, that its composition is so clear that it may force into the unit without a vote employees whom the unit has excluded for years.

This Court should insure that Westinghouse's Analysts get the "opportunity to express their choice in the manner provided by law." *N. L. R. B.* v. *Adhesive Prods. Corp.*, 281 F. 2d 89, 91 (2d Cir. 1960). A self-determination election is the only "manner provided by law" in the circumstances present here.

II.

In Holding That Analysts Are Not Professional Employees, the Board and the Court Below Ignored Their Qualifications, Ignored the Board's Prior Rulings, and Ignored Salient Facts That Lead Inevitably to the Opposite Conclusion.

Section 2(12) of the National Labor Relations Act, as amended, defines "professional employee" as

> "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from general academic education or from an

apprenticeship or from training in the performance of routine mental, manual, or physical processes . . ."

Section 9(b)(1) provides that the Board may not include professional employees in a unit of non-professionals unless the professionals vote, by secret ballot, in favor of such inclusion.

The Systems and Procedures Analysts clearly meet the first three tests of Section 2(12). We submit, on the authority of rulings of the Board itself, that they also meet the fourth.

The Regional Director held that although these Analysts "possess skills and exercise [independent] judgment and initiative," they "do not actually require . . . knowledge of an advanced type normally acquired through prolonged study in an institution of higher learning." (50a)

The Regional Director recognized that the tests of whether an employee is a professional is not the education he actually received but is the character of the work he performs. [50a, n. 15, citing *Chrysler Corp.*, 154 NLRB 352, 354 (1965) (27 engineers held to be professionals, although only 9 were college graduates); *Ryan Aeronautical Co.*, 132 NLRB 1160, 1164 (1961); *Western Elec. Co.*, 126 NLRB 1346, 1348 (1960)]. Nevertheless, he held, contrary to the authority he cited, that "the fact that only two of the seven Systems and Procedures Analysts in the instant case . . . hold college degrees in conformity with the the company-issued job descriptions, mitigates [sic] against [Westinghouse's] contention that such advanced training is necessary to performance in the disputed job category" (49a).

This holding was error. *The Board held that employees without college degrees may nevertheless be "professional" employees, in the very case that led to its first certifying the IUE at Westinghouse's Jersey City Works.* The professional status of time-study men was then in issue. Westinghouse required that they have a *technical school*

education or its equivalent, but not a college degree. Nevertheless, the Board held the time-study men to be professional employees because they made time and motion studies and correlated the facts they gathered in those studies with statistical data. *Westinghouse Elec. Corp.*, 89 NLRB 8, 11 (1950). "[T]he nature of the work engaged in" determined their professional status. *Chrysler Corp.*, 154 NLRB 352, 354 (1965).

The basic work of Systems and Procedures Analysts is the detailed investigating, analyzing and coordinating of all the facts that existing and contemplated systems and procedures may involve (A45-46, 52), and formulating or revising systems and procedures to meet assigned objectives (A52-54). This is a far cry from the technical work of the employees in the cases the Regional Director relied on to hold that the Analysts are technical employees.

If it were true that Westinghouse's two systems men were not "professionals" in 1959, when Westinghouse called them "Programmers," they certainly were professionals in 1967, when the IUE sought to include them in an office, clerical and technical unit.

> "Technical and scientific progress gives every promise of increasing the number of fields of professional employees as defined by Section 2(12) of the Act." *Westinghouse Elec. Corp.* v. *NLRB*, 236 F. 2d 939, 943 (3d Cir. 1956).

The "promise" has been fulfilled in the case of the Analysts at Westinghouse's Jersey City Works.

The Board and the Court below overlooked several salient facts. Important among them are (1) the statutory definition of professional employee fits like a glove at least two Analysts who are college graduates with degrees in business administration and mathematics (A131, 181, 184); (2) the Board itself had held that *two Analysts already were professional employees (time study men) before Westinghouse promoted them* to the Analyst position (A78; 89

NLRB 8 (1950)); (3) Analysts who did not already have degrees were taking courses leading to degrees in business administration (the statute does not say that, as of the date of the hearing, they must have *acquired* the degrees) *(moreover, the Analysts were taking these courses four years ago, which is when the Board held its hearings)*, and (4) the Analysts who did not have degrees, including the time-study men *whom the Board had classified as professionals*, had *at the time of the hearing* about five (now nine) years' experience in "related work."

Conclusion

This Court ought to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Statutes and Regulations Involved

National Labor Relations Act, as amended [61 Stat. 137, 140, 143, 49 Stat. 453, 29 U. S. C. 152(12), 157, 159(b), 159(c)(1), 160(e), 160(f)]

Definitions

SEC. 2. When used in this Act—* * *

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a). * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Representatives and Elections

SEC. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. * * *

Prevention of Unfair Labor Practices

SEC. 10. * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of

appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district; respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as povided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recom-

mendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. * * *

Appendix A

Rules and Regulations of the National Labor Relations Board (29 C. F. R. 223)

SEC. 102.67. *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.*—* * *

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D. C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director. * * *

Statements of Procedure of the National Labor Relations Board (29 C. F. R. 202)

SEC. 101.18 *Investigation of petition.*—(a) Upon receipt of the petition in the regional office, it is docketed and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) the appropriateness of the unit of employees for the purposes of collective bargaining and the existence of a bona fide question concerning representation within the meaning of the act, (3) whether

the election would effectuate the policies of the act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The field examiner, or other member of the staff, attempts to ascertain from all interested parties whether or not the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit. The petition may be amended at any time prior to hearing and may be amended during the hearing in the discretion of the hearing officer upon such terms as he deems just.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in subsection (a) of this section.

(c) For the same or similar reasons the regional director may request the petitioner to withdraw its petition. If the petitioner, despite the regional director's recommendations, refuses to withdraw the petition, the regional director then dismisses the petition, stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D. C. The petition may also be dismissed in the discretion of the regional director if the petitioner fails to make available necessary facts which are in its possession. The petitioner may within 10 days appeal from the regional director's dismissal by filing such request with the Board in Washington, D. C., after a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

APPENDIX B

Opinions, Judgment and Orders Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 332, 333—September Term, 1970.

(Argued January 5, 1971 Decided March 30, 1971.)

Docket Nos. 34917, 35073

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 456,
Intervenor.

Before:

LUMBARD, *Chief Judge,*
MOORE and SMITH, *Circuit Judges.*

Petition to review and set aside an order of the National Labor Relations Board, 177 N. L. R. B. No. 49 (1969); 182 N. L. R. B. No. 85 (1970); requiring Westinghouse to bargain with the IUE as the collective bargaining representative of the Systems and Procedures Analysts at Westinghouse's Jersey City Works. The N. L. R. B. cross appeals

for enforcement of its bargaining order. We grant enforcement of the Board's order.

MARTIN D. HEYERT, New York, N. Y. (Kelley Drye Warren Clark Carr & Ellis, Theodore R. Iserman, Frederick T. Shea and Eugene T. D'Ablemont, on the brief), *for petitioner.*

WARREN M. DAVISON, Deputy Assistant General Counsel, N. L. R. B. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel and Daniel M. Katz, Attorney, on the brief), *for respondent.*

ROBERT FRIEDMAN, New York, N. Y. (Irving Abramson and Ruth Weyand, Washington, D. C., on the brief), *for intervenor.*

LUMBARD, *Chief Judge:*

Westinghouse asks the Court to review and set aside an order of the Board requiring Westinghouse to bargain with the IUE as the collective bargaining representative of the Systems and Procedures Analysts at Westinghouse's Jersey City Works, and the N. L. R. B. cross appeals for enforcement of its bargaining order. 177 N. L. R. B. No. 49 (1969); 182 N. L. R. B. No. 85 (1970).

In 1950 the union was certified, and in 1956 it was recertified as the collective bargaining agent for "all office, clerical, and technical employees" at Westinghouse's Works at Jersey City and since 1950 the company and the union have entered into collective bargaining agreements covering these employees.

Appendix B

In 1956, shortly after the recertification of the bargaining unit, Westinghouse began an effort to convert its then-existing clerical procedures to systems which utilize IBM machines to perform clerical functions. During the late 1950's, the company expanded the mechanization process, acquired more equipment, and began hiring programmers to run the equipment. Computer equipment was first acquired in 1961; and in the same year the company issued a new job description for "Systems and Procedures Analysts A and B." There are presently seven Systems Analysts employed by the company in Jersey City, and their primary responsibility is to formulate procedures which will result in the satisfactory transfer of work to the new mechanized system.

The union first showed an interest in the Systems and Procedures analysts in 1965. On June 4 of that year Anton Handel, president of the union, in a letter to the company's industrial relations manager, Leonard Casner, requested information concerning a number of the company's employees who, for some reason, were outside of the scope of the bargaining unit. The company's answer on December 2, 1965 listed the names of the systems and procedures analysts and asserted that the reason they had not been included in the bargaining unit was that professional employees had been excluded from the certified unit by the specific language of the certification.

In 1967 the union filed a unit clarification petition with the Board in an attempt to include in the unit the company's Systems and Procedures Analysts "A" and "B." The Acting Regional Director conducted a hearing and on October 18, 1967 he issued his decision in which he ordered that the Systems and Procedures Analysts "A" and "B" be included in the unit. He found that they were not professional or confidential employees; that they were tech-

nical employees who had a community of interests with employees already in the unit; and that the unit clarification procedure was a permissible means to include them within the existing unit. The company requested review of the Regional Director's findings and the Board on review found that the analysts were "an accretion" to the certified unit, and rejected all of the company's other contentions. 173 N. L. R. B. No. 43 (1968).

When the union shortly thereafter requested recognition and bargaining, the company refused. An unfair labor practice charge was filed with the Board, and in defense the company challenged the Regional Director's conclusion that the Systems and Procedures Analysts should be included in the bargaining unit. It maintained that the Analysts are professional employees within section 2(12) of the National Labor Relations Act, 29 U. S. C. §152, and that they are confidential employees. The company further took the position that it had no duty to bargain with the union because the unit clarification procedure which was followed was inappropriate and an election should have been held. Without *de novo* consideration of the unit clarification record, the Board found that the company had failed to bargain with the union in contravention of 8(a)(1) and 8(a)(5) of the Act, and it entered a bargaining order.

When the company filed a petition for review in this Court, the Board was allowed to withdraw the certified list so that it could review the decision of the Regional Director in the underlying unit clarification proceeding in conformity with *Pepsi-Cola Bottling Co.* v. *N. L. R. B.*, 409 F. 2d 676 (2d Cir. 1969), cert. denied, 396 U. S. 905 (1969). The Board itself upheld the findings of the Regional Director. 182 N. L. R. B. No. 5 (1970).

Petitioner argues that the Regional Director and the Board erred in finding that the Analysts are technical em-

ployees. Petitioner contends that they are professional employees within section 2(12) of the Act and, as a result, the N. L. R. B. could not add them to the existing unit without holding an election. According to the company, the present Analyst positions are an outgrowth of the 1956 staff assistant position (a professional position outside of the certified bargaining unit) and like the staff assistant, the Analysts are professionals because they use independent judgment to determine the adaptability of the electronic data processing and computer equipment to new and changed systems. Petitioner also makes much of the fact that the 1965 job description listed a college degree as a prerequisite for the Analyst positions.

Section 2(12) of the Act precludes adding professional employees to a unit of non-professionals without affording them the opportunity to express their desires through the electoral process. It defines the professional employee as one whose work is "predominantly intellectual in character" and whose training is normally a result of "specialized intellectual instruction." The Board considers such factors as the possession of a certain measure of skill, knowledge, and independent exercise of judgment in determining whether workers are technical or professional employees. *Radio Corporation of America*, 141 N. L. R. B. 1134-1137 (1963); *Westinghouse Electric Corporation*, 163 N. L. R. B. 914, 916 (1967).

In support of the Regional Director's finding that the Analysts are technical rather than professional employees, the Board points out that although the Analysts do exercise some independence of judgment, their function is much narrower than that of professional employees such as the staff assistant and their range of discretion is not so broad. It was the staff assistant who considered all of the alternative systems for performing the clerical work

and made the affirmative recommendation to adopt the mechanization process. The Analyst merely applies that process to particular assigned projects and formulates systems and procedures in order to solve efficiency problems which are posed to him by others. His concern is with the methods of mechanization rather than the desirability of the process and although his position would never have come into being without the recommendation of the staff assistant, his responsibilities are much more clearly defined than those of the staff assistant.

Furthermore, it is apparent that in Westinghouse's operations, the Systems and Procedures Analysts do not need the kind of knowledge of an advanced type that is normally acquired as a result of prolonged study in an institution of higher learning. Thus, despite the fact that the company's 1965 job descriptions for Analyst positions listed a college degree as a prerequisite, only two out of the seven Analysts have college degrees. In the *Western Electric Company* case, 126 N. L. R. B. 1346, 1349 (1960), the Board, in analyzing the criteria for professional employees, stated that the educational requirements for particular jobs are very important but "if few in the group possess the appropriate degree, it logically follows that the educational characteristics of the work are not those requiring the utilization of advance knowledge."

Four of the seven employees now serving as Systems and Procedures Analysts were promoted to the Analyst positions directly from jobs in the existing bargaining unit. While an employee can change his work status as a result of additional training and experience, there would seem to be no basis for finding that these four formerly technical employees had become professionals overnight merely by moving into jobs outside of the existing unit of non-professional employees. The work of the Analysts is not pre-

dominately intellectual in character and, as has been indicated, their responsibilities are clearly and narrowly defined. Moreover, the Board has held in other cases that employees who have responsibilities which are substantially similar to those of the Analysts are technical rather than professional employees.[1] We therefore agree with the Board that the Systems and Procedures Analysts are technical rather than professional employees and that section 2(12) of the N. L. R. B. does not require the holding of an election before including them in the existing bargaining unit.

The company takes the position that even if the Board was correct in its findings that the Analysts are technical rather than professional employees, the Board still had no authority to include them within the existing bargaining unit because the union's petition for unit clarification raised no question of representation under the Act.[2] According to Westinghouse, the Board can add employees to an existing bargaining unit only when a question of representation has been raised.

We hold that even though no question of representation was raised by the petition for unit clarification, the Board did have the power to add the Analysts to the existing unit

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[1] "Engineering data processors" are technical employees. *Radio Corporation of America,* 141 N. L. R. B. 1134, 1136-7 (1963). "Programmers" are technical. *R. L. Polk & Co.,* 123 N. L. R. B. 1171, 1172-3 (1959). "Instrument systems analysts" are technical employees. *Westinghouse Electric Corporation,* 163 N. L. R. B. 914-916 (1967).

[2] At one point in its argument the company takes an entirely different approach to this question—it contends that the union's petition for clarification does raise a question of representation and, for this reason, that an election is required. Since we agree with the finding of the Regional Director and the Board that no question of representation was raised by the clarification petition, we do not address ourselves to the scope of the Board's authority to clarify a bargaining unit when it is faced with a question of representation.

because the record shows that the Analysts and the employees already represented by the unit shared a community of interests, and the Board could have reasonably concluded that including them in the existing unit would contribute to stability in bargaining. Due to its expertise, the Board has been given wide discretion in determining the appropriate bargaining unit. *N. L. R. B.* v. *Food Employers Council, Inc. and Retail Clerks Union,* 399 F.2d 501 (9th Cir. 1968). The Board's authority to define the appropriate bargaining unit is sufficiently broad to enable it to include new employees in an existing unit without holding an election when the requisite community of interests is present, and inclusion would result in a more efficient collective bargaining relationship. *Carey* v. *Westinghouse Electric Corporation,* 375 U. S. 261, 268-269 (1964).[3]

Here the Regional Director and the Board were justified in finding the requisite community of interests between the seven Systems and Procedures Analysts and the employees in the already existing unit. The Analysts and other employees have comparable earnings, and the Analysts work the same hours as the company's first shift. The Analysts and the others receive the same fringe benefits (vacation time, hospitalization, and sick leave). The only significant differences are that the Analysts do not punch a time clock, have different immediate supervisors, and receive only straight time rates for overtime work. Furthermore, the Board could have reasonably concluded that including these

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[3] The process through which the Board has added new employees to an existing group without holding an election has often been called "an accretion." When the new employees are added to and co-mingled with existing employees as to lose their separate identity, their inclusion in the existing bargaining unit follows as a matter of course. When such inclusion is permitted on the basis of criteria developed by the Board and approved by the courts . . . the new group is called an accretion to the old group. *N. L. R. B.* v. *Food Employers Council, Inc.,* 399 F.2d 502-3 (9th Cir. 1968); also *N. L. R. B. v. Sunset House, et al.,* 415 F.2d 545, 547 (9th Cir. 1969).

seven employees in the existing two hundred and eighty man unit would contribute to a more efficient and stable bargaining relationship between Westinghouse and its employees. We therefore conclude that the record fully supports the Board and the Regional Director in adding these employees to the existing unit without an election.

At the same time we feel that there is some merit to the company's contention that the right of free choice for the new employees should be one of the important considerations for the Board in determining the means to redefine the scope of the appropriate bargaining unit. As a general rule, the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit. *N. L. R. B.* v. *Masters Like Success, Inc.*, 287 F. 2d 35, 36 (2d Cir. 1961); *N. L. R. B.* v. *Adhesive Products Corp.*, 281 F. 2d 89, 91 (2d Cir. 1960). And when the relevant considerations are not free from doubt, it would seem more satisfactory to resolve such close questions through the election process rather than seeking an addition of the new employees by a finding of accretion. *N. L. R. B.* v. *Food Employers Council, Inc. and Retail Clerks Union, Local 770*, 399 F.2d 501, 502 (9th Cir. 1968); *International Union, etc.* v. *N. L. R. B.*, 231 F.2d 237, 243 (7th Cir. 1956), cert. denied, 352 U. S. 908.

The company further argues that the union waived the right to bargain on behalf of the Analysts because the union was dilatory in claiming representation rights through the unit clarification petition for classifications which arose after the union's certification. Petitioner points out that since 1961 the IUE had no less than two national and two local negotiations with the opportunity to bargain for the Analysts and failed to do so. The Board answers that the failure to claim these classifications at an earlier date is not fatal to the union's right now to invoke the clarification proceedure because the company withheld information regarding the Analysts job description

and, as a result, made it impossible for the union to determine whether the Analysts should be within the existing unit. We agree.

In 1965 the union first sought information regarding six named employees who had formerly been classified as "Programmers" and were at about that time reclassified as "Analysts," which is their present job title. The request for information was made on June 4, 1965. On July 13, 1965, the union complained that it had received no reply to its request and when the company finally did answer by letter dated December 2, 1965, it said only that the employees were classified as Systems and Procedures Analysts "A" or "B" and that "the specific language of certification excludes 'professional employees.'".

As the Regional Director indicated on the record, the company gave the union too little information to have enabled the union to assess the validity of the company's assertion that the Analysts were professional employees and excluded from the unit on that ground. Between the time of the company's vague reply of December 2, 1965 and the filing of the union's petition for unit clarification in 1967, there was only the October 1966 national collective bargaining agreement and its local supplement. Given these facts, the record as a whole supports the conclusion of the Board and the Regional Director that the union had not "slept on its rights" so as to preclude it from raising the unit clairfication issue through a petition for clarification in 1967. We find that the company's other arguments are without merit.

Enforcement is granted.

MOORE, *Circuit Judge* (concurring)

I concur in the opinion of the Court.

The National Labor Relations Act, §9(b)(1), 29 U. S. C. §159(b)(1) prohibits the adding of professional employees

to a non-professional unit without an election. The relevant inquiry therefor involves an examination of whether the definition of the term "professional" is met. A "professional" is defined in §2(12) of the National Labor Relations Act, 29 U. S. C. §152, as:

> "any employee engaged in work (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . . ."

I agree fully with the following statement of the Court relating to the accretion doctrine:

> "As a general rule, the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit [citations omitted]. And when the relevant considerations are not free from doubt it would seem more satisfactory to resolve such close question through the election process rather than seeking an addition of new employees by a finding of accretion."

Applying the standard of § 2(12), I am not "free from doubt" that the Systems and Procedures Analysts A and B (Analysts) meet that part of the definition of "professional" which requires that the work involved must be such that it requires "knowledge of an advanced type . . .

customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning." On the facts of this particular case, only two of the seven persons currently employed as Analysts have college degrees and four of the Analysts were promoted to Analyst positions directly from existing bargaining units. Thus, in this case there was a substantial basis for the Board's finding of accretion.

However, in the future, persons employed in jobs of this type may well meet the requirements of the statutory definition of "professional." The decision of the Acting Regional Director in this case recognized the "predominately intellectual and varied . . . character" of the Systems Analysts' work. As systems become more complex, so does the job of the Analyst. The devising and revising of systems begin to involve more and more management type decisions in that the nature of a system may determine not only what utilization is to be made of computer and data processing equipment but also what utilization is to be made of a wide variety of employees throughout the plant, the nature of whose job is sufficiently related to the system in question. Accordingly, it is to be expected that Analysts of the future will require greater educational attainment than that possessed by the Analysts here involved. As educational patterns change and scientific and technical courses are available in two-year colleges or similar educational institutions giving intensive and concentrated training in this field, such Analysts, in my opinion, would clearly not be precluded from being treated as professionals merely because they had not elected to follow the more stereotyped four-year course.

Therefore, although I wholly subscribe to the Court's opinion on the facts here presented, I would construe the word "professional" with the greatest liberality in deciding this status and would give to such an employee the broadest rights to decide whether or not he might wish to be a union member or remain outside the fold.

Supplemental Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 22-CA-3685

WESTINGHOUSE ELECTRIC CORPORATION

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 456, AFL-CIO

On June 30, 1969, the National Labor Relations Board issued its Decision in this proceeding, finding that Respondent had engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.[1]

Thereafter Respondent filed with the Court of Appeals for the Second Circuit a petition to review and set aside the Board's Order. The Board filed with the Court a cross-application for enforcement of its Order.

Thereafter, the Supreme Court of the United States denied the Board's petition for certiorari in *Pepsi-Cola Buffalo Bottling Co.* v. *N. L. R. B.*, 396 U. S. 904 (November 6, 1969). Decision below 409 F.2d 676 (C. A. 2).

After the denial of the petition for certiorari, the Board moved the Court of Appeals for leave to withdraw the certified list of documents, pleadings and materials comprising the record of the proceeding to permit the Board to pass upon the controlling representation issue in conformity with the decision of the Court of Appeals in *Pepsi-Cola Buffalo Bottling Co., supra*. The Court of Appeals entered an order granting the Board's motion.

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[1] 177 NLRB No. 49.
182 NLRB No. 85

Supplemental Decision and Order

Thereafter, the Board granted leave to the parties to file a Statement of Position respecting the issues. The Respondent, General Counsel, and Charging Party each filed a Statement.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Decision and Order issued in June 1969 was a grant of Summary Judgment finding that all issues raised by Respondent had been fully litigated in the related representation case.[2] The complaint in this case arose out of Respondent's failure, after a hearing, to honor the Regional Director's Decision and Order Clarifying Bargaining Unit.[3] In his Decision, the Regional Director had granted the Union's request to include Systems and Procedures Analysts "A" and "B" in the bargaining unit. He found (1) that the disputed employees were technical employees with a close community of interest with the technical employees already in the unit and were not professional employees; (2) that they were not confidential employees; and (3) that they could be included in the bargaining unit by means of the unit clarification procedure.

As more fully set out in the Decision and Order in this case, Respondent filed a request for review. The Board denied review on the issues raised by the first two findings of the Regional Director, but granted it as to the third issue.

The Board issued its Decision on Review in which it affirmed the Regional Director's findings and found the disputed employees to be an accretion to the certified unit.

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[2] Case 2-RC-8368. Decision and Direction of Election, 116 NLRB 1545. Board Certification of the Union, December 10, 1956. Decision on Review, 173 NLRB No. 43. (October 24, 1968).

[3] Case 22-UC-11.

Supplemental Decision and Order

Respondent does not contend that the Regional Director erred in finding that the disputed employees were not confidential employees.

We have since made an independent review of the record of the hearing in the representation case from which we conclude that the Regional Director's other findings and conclusions, as set forth in his Decision and Order Clarifying Unit, were also correct in all respects. As the issues have been fully litigated and no newly discovered and previously unavailable evidence was offered by Respondent in its answer to the Notice to Show Cause and memorandum in support of answer, and in its Statement of Position on Remand, no further hearing is required. We therefore affirm the bargaining order previously issued.

Supplemental Order

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby affirms its Order issued in this proceeding on June 30, 1969.

Dated, Washington, D. C. May 19, 1970.

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Frank W. McCulloch, Chairman

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Gerald A. Brown, Member

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Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Decision and Order

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 22-CA-3685

WESTINGHOUSE ELECTRIC CORPORATION

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 456, AFL-CIO

Upon a charge filed by International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint dated February 25, 1969, against Westinghouse Electric Corporation, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, and complaint and notice of hearing before a Trial Examiner were duly served upon Respondent.

With respect to the unfair labor practices, the complaint alleges, in substance, that on December 10, 1956, the Union was duly certified by the National Labor Relations Board[1] as the exclusive bargaining representative in a unit found appropriate by the Board; that on October 24, 1968, the Board, in its "Decision of Review,"[2] found that employees in two disputed classifications are an accretion to the above certified unit and that the unit as clarified includes these

[1] Case 2-RC-8364. This certification was pursuant to the Board's Decision and Direction of Elections in *Westinghouse Electric Corporation*, 116 NLRB 1545.

[2] 173 NLRB No. 43.

177 NLRB No. 49.

two classifications; and that, at all times since on or about October 25, 1968, Respondent has refused to bargain with the Union as the exclusive bargaining representative of Respondent's employees in the unit found appropriate as clarified, although the Union has requested and is requesting it to do so. On March 10, March 26, and April 1, 1969, respectively, Respondent filed its answer with two amendments, in which Respondent admitted its refusal to bargain with the Union, but denied the appropriateness of the unit as clarified, and denied the commission of the unfair labor practices alleged.

On April 9, 1969, the General Counsel filed with the Board a Motion for Summary Judgment, and a supporting memorandum, on the ground that no issue of fact or law is in dispute since all matters raised have been determined by the Board in its unit clarification proceeding,[3] and requesting, in view of Respondent's answer, that the Board enter judgment against Respondent on the pleadings. On April 14, 1969, the Board issued an Order, transferring the proceeding to the Board, with a notice to show cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, Respondent filed an answer to the notice to show cause, and a supporting memorandum.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

The record establishes that, pursuant to Board Decisions and Directions of Elections, issued in 1950[4] and 1956[5],

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[3] *Ibid.*

[4] *Westinghouse Electric Corporation*, 89 NLRB 9.

[5] *Westinghouse Electric Corporation*, 116 NLRB 1545.

the Board duly certified and recertified the Union as the exclusive bargaining representative of an appropriate bargaining unit of office, clerical and technical employees in Respondent's Jersey City Works, Jersey City, New Jersey. In 1967, by a petition filed under Section 9(b) of the Act, the Union sought to include, as an accretion to its certified unit, employees in the classifications of Systems and Procedures Analysts "A" and "B" (as well as certain other employees not in issue here.) At that time, the unit description was as follows:

> All office, clerical and technical employees of Westinghouse Electric Corp., Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, including assistant buyers, but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters, industrial relations employees; secretaries to Company officers, managers and assistant managers, purchasing agents, superintendents, and factory accountants; the internal auditor, budget accountants, the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2(11) of the Act, as amended.

Thereafter, a hearing was held before Hearing Officer Julius Cohn. All parties appeared and were given full opportunity to participate in the hearing. The Union and Respondent filed briefs in support of their respective positions.

On October 18, 1967, the Acting Regional Director for Region 22 issued a Decision and Order Clarifying Bargaining Unit[6] in which he granted the Union's request to include Systems and Procedures Analysts "A" and "B" in the bargaining unit. Specifically, and contrary to the con-

[6] Case 22-UC-11.

tention of Respondent, the Acting Regional Director found that (1) these employees were technical employees having a close community of interest with the technical employees already in the unit, and were not professional employees; (2) they were not confidential employees; and (3) they could be included in the bargaining unit by means of the unit clarification procedure.

Thereafter, Respondent filed a timely request for review. The Board, by telegraphic order dated January 3, 1968, granted review only with respect to issue (3) above, and denied review as to the other issues. Both parties filed briefs in support of their respective positions. On October 24, 1968, the Board, in its Decision of Review, *supra*, rejected Respondent's contentions, affirmed the Acting Regional Director's findings, and found the disputed employees to be an accretion to the certified unit. On November 12, 1968, Respondent filed a Motion for Reconsideration and Request for Oral Argument, which motion and request the Board denied on December 18, 1968.

In its Answer to Notice to Show Cause, and its memorandum in support thereof, Respondent contends that the General Counsel's motion should not be granted since the Board erred in holding that: (1) these employees are not professional employees; (2) they are not confidential employees; and (3) they could be included in the bargaining unit by means of a unit clarification procedure. In support of its contention, Respondent offers no additional evidence, but asserts that the Board's Decision of Review was contrary to established law, and urges that the Board consider *de novo* the evidence adduced at the hearing in Case 22-UC-11. We find no merit in these contentions.

It is well settled that, in the absence of newly discovered or previously unavailable evidence, the Board will not relitigate in a subsequent refusal-to-bargain proceeding matters which have been disposed of in a prior related repre-

sentation case.[7] This matter having already been fully litigated in the related unit clarification proceeding, it is clear that no basis exists for relitigating it now. Accordingly, the General Counsel's Motion for Summary Judgment is granted. On the basis of the record before it, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the Commonwealth of Pennsylvania. At all times material herein, Respondent has maintained its principal office at 3 Gateway Center, Pittsburgh, Pennsylvania, and various other places of business, including its Elevator Division Plant at 150 Pacific Street, Jersey City, New Jersey, herein called the Jersey City Plant, and is now, and at all times material herein has been, continuously engaged at said Jersey City Plant in the manufacture, sale, and distribution of elevator machines, electric controllers, and related products.

During the past year, which period is representative of all material times herein, Respondent caused to be manufactured, sold, and distributed at its Jersey City Plant, products valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from said Jersey City Plant in interstate commerce directly to States of the United States other than the State of New Jersey.

Respondent admits, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[7] See *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146; *E-Z Davies Chevrolet*, 161 NLRB 1380, enfd. 395 F. 2d 191 (C. A. 9).

II. The Labor Organization Involved

International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The Unit

The following employees at Respondent's Jersey City Plant constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All office, clerical and technical employees of Westinghouse Electric Corp., Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, including assistant buyers, and Systems and Procedures Analysts "A" and "B", but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters, industrial relations employees; secretaries to Company officers, managers and assistant managers, purchasing agents, superintendents and factory accountants; the internal auditor, budget accountants, the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2(11) of the Act, as amended.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about October 25, 1968, and continuing to date, the Union has requested and is requesting Respondent to bargain collectively with it as the exclusive collective-bargaining representative of Systems and Procedures Analysts "A" and "B" as part of the above unit. Since on or about October 25, 1968, and continuing to date,

Respondent has refused, and continues to refuse, to bargain collectively with the Union as exclusive bargaining representative of the Systems and Procedure Analysts "A" and "B" in the above described unit.

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of Respondent in an appropriate unit, that thereafter said unit was clarified by the Board to include Systems and Procedure Analysts "A" and "B", and said unit is constituted as described above, and that the Union at all times since October 24, 1968, has been and now is the duly certified exclusive bargaining representative in the aforesaid unit, as clarified, within the meaning of Section 9(a) of the Act. We further find that Respondent has, since on or about October 25, 1968, refused to bargain collectively with the Union as exclusive bargaining representative of the Systems and Procedures Analysts "A" and "B" in the appropriate unit, as clarified, and that, by such refusal Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The acts of the Respondent set forth in section III, above, occurring in connection with its operations as described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning

of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit as clarified, and, if an understanding is reached, embody such understanding in a signed agreement.

Conclusions of Law

1. Westinghouse Electric Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All office, clerical and technical employees of Westinghouse Electric Corporation, Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, including assistant buyers and systems and procedures analysts "A" and "B," but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters, industrial relations employees; secretaries to Company officers, managers, assistant managers, purchasing agents, superintendents and factory accountants; the internal auditor, budget accountants, the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2(11) of the Act, as amended, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 10, 1956, the above-named labor organization has been the exclusive bargaining representative of all employees in the appropriate unit as clarified on October 24, 1968.

5. By refusing on or about October 25, 1968, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of the Systems and Procedures Analysts "A" and "B" in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Westinghouse Electric Corporation, Jersey City, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO, as the exclusive bargaining representative of Systems and Procedures Analysts "A" and "B" in the following appropriate unit:

> All office, clerical and technical employees of Westinghouse Electric Corp., Jersey City Works, 150

Pacific Avenue, Jersey City, New Jersey, including assistant buyers, and systems and procedures analysts "A" and "B," but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters, industrial relations employees; secretaries to Company officers, managers, assistant managers, purchasing agents, superintendents and factory accountants; the internal auditor, budget accountants, the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2(11) of the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of Systems and Procedures Analysts "A" and "B" in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Jersey City, New Jersey, plant, copies of the attached Notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon

[8] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals Enforcing an Order."

receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

Dated, Washington, D. C., June 30, 1969.

FRANK W. MCCULLOCH,
Chairman

GERALD A. BROWN,
Member

HOWARD JENKINS, JR.,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act (as amended) we hereby notify our employees that:

> WE WILL NOT refuse to bargain collectively with International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO, as the exclusive representative of Systems and Procedures Analysts "A" and "B" in the bargaining unit described below.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.
>
> WE WILL, upon request, bargain with the above-named Union as the exclusive representative of Systems and Procedures Analysts "A" and "B" in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

> All office, clerical and technical employees of Westinghouse Electric Corporation, Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, including assistant buyers and systems and procedures analysts "A" and "B," but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters, industrial relations employees; secretaries to Company officers, managers, assistant managers, purchasing agents, superintendents and factory accountants; the internal auditor, budget accountants,

the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2(11) of the Act, as amended.

WESTINGHOUSE ELECTRIC CORPORATION

.....
(Employer)

Dated..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone-201-645-2100.

Decision on Review

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 22-UC-11

WESTINGHOUSE ELECTRIC CORPORATION

Employer,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 456, AFL-CIO

Petitioner.

On October 18, 1967, the Acting Regional Director for Region 22 issued a Decision and Order Clarifying Bargaining Unit in which he granted the Petitioner's request to include Systems and Procedures Analysts "A" and "B" in the existing unit of office clerical and technical employees which the Petitioner represents pursuant to a 1956 Board certification.[1] Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review. The Board, by telegraphic Order dated January 3, 1968, granted review with respect to the Regional Director's inclusion of the aforementioned classifications in the bargaining unit by means of the clarification procedure.[2] Both parties filed briefs.

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[1] No request for review has been filed with respect to the Regional Director's denial of that part of Petitioner's request which also sought to include in its certified unit the Traffic Analysts "A" and "B".

[2] The Board denied review of the Employer's contention that the Regional Director erred in finding the disputed classifications to be technical, rather than professional or managerial employees.

173 NLRB No. 43.

Decision on Review

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the entire record in this case including the briefs of the parties with respect to the issues under review and makes the following findings:

The Employer's principal argument on review is that the disputed classifications are but an outgrowth of a "staff assistant" position in existence at the time of the certification, which was specially excluded from the collective-bargaining unit. The record, however, does not disclose the duties of the staff assistant classification. It does disclose that immediately prior to the Union's certification in 1956 for the unit of clerical and technical employees here involved the Employer hired a staff assistant for the special task of conducting a management study of the feasibility of converting the then existing clerical procedures to mechanized systems involving the use of IBM machines. As a result of this survey, the Employer adopted the new procedures and, in December 1957, formulated for the first time a job classification related to those procedures, designated as "programmer." The former staff assistant was then made the first occupant of this position. Although these mechanized procedures were first applied in the area of inventory control, they have since been enlarged and expanded to convert the Employer's various other clerical fields to the use of modern data processing techniques. Concurrently such techniques have increased in level of complexity, as evident particularly by the Employer's use, beginning in 1961, of IBM computer equipment. Likewise the original job title of "programmer" has evolved, first into "Data Processing Methods and Systems Analyst," A and B, and then into the present "Systems and Procedures Analyst" A and B classifications with which we are here concerned.

It is evident from the foregoing that the Employer's present computerized procedures are but a substitute, albeit more sophisticated complex, for the work originally performed by the Employer's clerical unit employees. As to the asserted relationship of the disputed classifications to the staff assistant classification, the record discloses no more than that particular staff assistant to whom reference is made was hired to conduct a *study of the feasibility* of converting clerical procedures to systems involving the use of IBM machines. Although the original staff assistant's role in the development of the Employer's computer system would appear to suggest that his exclusion was warranted either on professional or managerial grounds, it does not follow that this unit should exclude those subsequently hired to implement the system developed through his effort. The function of the disputed classifications here is the *initiation of actual procedures* utilizing the IBM equipment. It is thus apparent, and we find from the entire record, that the Systems and Procedures Analyst positions are not an outgrowth of the original staff assistant position but are classifications deriving from the use of the new data processing techniques and are, as the Acting Regional Director found, job classifications which came into existence subsequent to the 1956 certification.

The Employer further argues on review, as it did to the Acting Regional Director, that whatever the origin of the disputed classifications, Petitioner by its inaction over a lengthy period has waived its right now to seek their inclusion in the certified unit through the clarification procedure. We also reject this contention. The disputed classifications did not reach a job content approaching their present form until 1961 and, in fact, the present description of their duties and the designation of their job classifications were not arrived at until 1965. Further, the Employer did not on a timely basis reply to the Petitioner's request,

made in the summer of 1965, for information concerning the unit placement of these jobs. When it finally did respond, the Employer merely asserted its position that these employees were professional employees, who are excluded from the certified unit, and did not provide Petitioner with facts enabling an assessment of the validity of the Employer's position. In all these circumstances, including the fact that 4 of the 7 occupants of the disputed classifications were formerly employed on unit positions, we agree with the Acting Regional Director that Petitioner's failure to claim these classifications at an earlier date was not fatal to its right now to invoke the Board's unit clarification procedure.

Accordingly, and in view of the fact that the employees in disputed classifications are technical employees having a close community of interest with other technical employees of the Employer, all of whom are represented by the Petitioner in the existing office, clerical and technical unit, we affirm the Acting Regional Director's finding that the Systems and Procedure Analysts "A" and "B" are an accretion to that certified unit and that unit as clarified includes the aforesaid two classifications.

Dated, Washington, D. C.
Oct. 24, 1968

.....
Frank W. McCulloch, Chairman

.....
Gerald A. Brown, Member

.....
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Decision and Order Clarifying Bargaining Unit

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

TWENTY-SECOND REGION

Case No. 22-UC-11

WESTINGHOUSE ELECTRIC CORPORATION,

Employer,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 456, AFL-CIO,

Petitioner.

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before Julius Cohn, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Acting Regional Director.

Upon the entire record in this case the undersigned finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner proposes to clarify the bargaining unit of approximately 280 employees by including therein

for the first time employees in the classifications of *Systems and Procedures Analysts "A" and "B"* and *Traffic Analysts "A" and "B"*[1] in the existing certified unit of all office, clerical and technical employees at the Company's Jersey City Works, Jersey City, New Jersey.[2] The Systems and Procedures Analysts and the Traffic Analysts, which the Petitioner contends to be technical employees, have not been and are not now represented by a bargaining agent. The Employer opposes the requested unit clarifications on the ground that the employees involved are professional employees within the meaning of Section 2(12) of the Act.[3]

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[1] At the hearing, the Petitioner's motion to amend its petition by deleting the classification "Application Engineer '1'" from the proposed inclusions sought by clarification was granted.

[2] The current unit description is as follows:

"All office, clerical and technical employees of Westinghouse Electric Corp., Jersey City Works, 150 Pacific Avenue, Jersey City, New Jersey, (including assistant buyers); but excluding all staff assistants to department managers or the general manager, buyers, confidential salary payroll clerks, paymasters' industrial relations employees, secretaries to Company officers, managers, assistant managers, purchasing agents, superintendents and factory accountants, the internal auditor, budget accountants, the audit clerk, and other professional employees, guards, and supervisors as defined in Section 2(11) of the Act, as amended."

[3] Section 2(12) of the Act defines the term "professional employee" as meaning:

"(12) The term "professional employee" means—

(a) Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of

(continued on page 44a)

The Employer also contends that the Systems and Procedures Analysts are confidential employees, while the Traffic Analysts, in addition, are managerial.

The Employer's Jersey City, New Jersey, plant is a part of its Elevator Division. At this location, the Company is engaged in the manufacture and construction of elevator machines, electric controllers and related products. The operation is a job shop where construction proceeds pursuant to customer contract rather than mass production.

The Petitioner was first certified as bargaining representative for the employees of the within unit in 1950[4] and recertified in 1956.[5] Since October 1, 1950, the Petitioner and Employer have entered into a series of collective bargaining agreements covering this unit. In practice, there is currently in existence a national agreement between the Employer and the Petitioner's International Union, dated October 17, 1966, and a local supplementary agreement relating to the instant unit between the Employer and the Petitioner, dated October 31, 1966.[6]

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specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

[4] *Westinghouse Electric Corporation*, 89 NLRB 833-35. Previously, United Electrical, Radio & Machine Workers of America (UE) had represented substantially this same unit since 1945.

[5] 116 NLRB 1545.

[6] The local agreement will expire with the national agreement on November 10, 1969.

Decision and Order Clarifying Bargaining Unit

A. *The Systems and Procedures Analysts*

The record reveals that there are now seven Systems and Procedures Analysts presently employed by the Company at Jersey City.[7] Of these, one is in the "A" grade while the remainder are classed as "B" analysts. All work within the Computer Systems Development Department. The supervisor of this department reports to the Manager of Administrative Services who also is generally responsible, *inter alia*, for the Data Processing Department and for the operation of the Key Punch Department, where employees record data that comes from various departments onto punch cards. In the Data Processing Department bargaining unit employees classified as data processing machine operators operate IBM 360 computers and other data processing equipment utilizing punched cards received from the Key Punch Department. The data processing machine operators in using their equipment, also receive and follow instructions prepared and computer-programmed for them by the Systems and Procedures Analysts, who do all the computer programming in the Elevator Division.

Systems and Procedures Analysts are assigned projects in instances where it is felt that procedures might be improved in various other departments. After consulting with the heads of the affected departments to determine the nature of the problem and the desired solution, the analyst, by use of his independent studies and judgment, recommends routes, methods or systems for achieving this purpose. After deciding on the method, the analyst writes up a program or series of programs and draws diagrams in the nature of flow charts showing necessary steps which should be taken to arrive at the final product. In preparing his work, the Systems and Procedures Analyst programs the material to be put in the computer, writes the procedure for the com-

[7] A vacancy exists for an eighth Systems and Procedures Analyst.

puter machine operator, runs a test of the procedure and writes the instruction for employees in the affected departments as to any new procedures resulting from the institution of the new system. In selecting the method, the analyst confers with his supervisor and the heads of the departments involved, all of whom might pass judgment on the acceptability of his work. If the system is a procedure of relatively small magnitude, the analyst might have direct contact with the relevant supervisor. Analysts "A" are more experienced and highly compensated than analysts "B" and may expect to work on projects broader in scope. As occasion warrants, analysts "A" may assist Analysts "B." When the program and procedure is written, it is given to the Data Processing Department where the computer machine operators make the necessary changes in the machines and run the new system on a regular basis.

While the most recent job description established by the Employer for Systems and Procedures Analysts "A" and "B" requires college degrees in business administration or business management, only two of the seven analysts have degrees.[8] Four of the seven analysts were computer machine operators and, it is clear from the record that a knowledge of computers, their operation and potential is an important qualification for their work. Although one analyst, who had been a machine operator, was promoted to analyst "B" subsequent to the issuance of the last job description for this position in 1965, he did not possess the collegiate prerequisite.

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[8] The Systems and Procedures Analyst "A", testified that he had earned 18 college credits, but that he had had prior experience as a machine operator, joining the Employer in that capacity in 1960. He testified that before becoming an analyst, he attended a course in the IBM 1401 computer as did another witness who is still a computer machine operator. He also testified that after becoming an analyst, he and other analysts attended a six-week course on the IBM 360 computer. This IBM 360 course was not taken by the operator.

The Employer's witnesses contend that this position began subsequent to the last certification, when, in November 1956, a staff assistant[9] was hired for the purpose of studying, planning, and, if feasible, effectuating the conversion from then-existing clerical procedures to systems involving the use of IBM machines. Pursuant to the analysis and recommendations of the staff assistant, the Employer obtained its initial equipment, including key punches, verifiers, a sorter, reproducer, collator, accounting machine and electronic calculator. These mechanized procedures were first applied to the area of inventory control. In December 1957, the Employer issued its first job description in this area, designating the same staff assistant as a programmer. He became classified as a programmer "A" when another employee was hired as programmer "B" in August 1959, to work with him.[10] As the extent of mechanization increased and expanded into different areas, the amount of equipment increased and grew more complex. Early in 1961, the Company obtained its first computer equipment at this location. The first position descriptions for Systems and Procedures Analysts "A" and "B" were originated in July 1961.

The record revealed that by letter dated June 4, 1965, the Petitioner requested specific information concerning the duties and responsibilities of a number of employees, including those who were classified as Systems and Procedures Analysts. In a follow-up letter dated July 13, 1965, the Petitioner noted that no reply had as yet been received and reiterated its request. On December 2, 1965, the Employer replied to the Petitioner's request by listing the names of the various employees next to their job titles.

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[9] Staff assistants are excluded from the unit.

[10] The first programmer "B" is now supervisor of the Data Processing Department, where he oversees the operation of the computers.

Those named as Systems and Procedures Analysts, the Employer stated, were excludable from the unit as professional employees. Other classifications in the letter of December 2 were excluded by the Employer on the basis that they were confidential employees. The Systems and Procedures Analysts "A" and "B" were not referred to in this letter as confidential employees.

The record further reveals that Systems and Procedures Analysts "A" and "B" receive compensation comparable to other employees who are within the bargaining unit, and are salaried.[11] They do not punch a time clock. They work the same hours as the Company's first shift, from 8:30 a.m. to 5:00 p.m., based on a 40 hour week. When they are scheduled to work overtime, they are compensated for this overtime work at a straight time rate. The analysts receive the same vacation time, hospitalization, holidays, and enjoy the same wage continuation policy (paid sick leave) as do salaried employees within the unit.

On the basis of the foregoing and consistent with established Board precedent, I find that the Systems and Procedures Analysts "A" and "B" are technical employees[12] and may be included within a unit of office, clerical and technical employees by means of unit clarification.[13]

[11] The salary range for Systems and Procedures Analysts is from $651.40 to $952 monthly. The salary range for bargaining unit employees in the highest labor grade is from $151.45 to $192.90 per week, or, computed on the basis of 4.3 weeks per month, from $651.24 to $829.47 per month. The highest paid Analyst "B" is now earning $825 monthly, thus only the Analyst "A" at a monthly wage of $952, is earning more than employees within the unit.

[12] *Armstrong Rubber Co.*, 144 NLRB 1115, 1120; *Radio Corporation of America*, 141 NLRB 1134; *Worthington Corporation*, 155 NLRB 222; *Robbins & Myers, Inc.*, 144 NLRB 295; *R. L. Polk & Company*, 123 NLRB 1171.

[13] *Radio Corporation of America*, *supra*.

In arriving at this conclusion, the similarity of the functions of the Systems and Procedures Analysts as described in the instant record and in the cited cases have been particularly noted. As in the instant case, those employees engaged in the technically designated job classifications described in the authorities cited, performed conceptual work and were called upon to exercise independent judgment. For example, employees who were required to use independent judgment and initative in adopting new programs for computer applications, and who directed and coordinated all phases of tabulating or data processing work, were required to accomplish complex specific jobs on established systems, and who assisted in establishing new systems for application of tabulating or data processing techniques; who planned proper procedures such as writing of operating instructions, storing program coding, making flow charts and formats, designing forms and preparing set-up diagrams have been held to be technical employees.[14] In deciding, in these cases, that such personnel were technical employees, the Board consistently recognized the measure of superior skill, knowledge, responsibility and independent exercise of judgment and initiative manifested by and required of these persons. It is noted that here, as in the cited cases, the personnel performing the described tasks were, in fact, able to qualify and perform generally with only technical school training. The fact that only two of the seven Systems and Procedures Analysts in the instant case actually do hold college degrees in conformity with the company-issued job descriptions, mitigates against the Employer's contention that such advanced training is necessary to performance in the disputed job category. However, the evidence of formal training is, in fact, but one consideration in the determination that the Systems and Procedures Ana-

[14] *Worthington Corporation, supra; Armstrong Rubber Co., supra.*

lysts are technical and not professional employees.[15] While recognizing the technical nature of their duties and the measure of independent judgment entailed therein, it is clear from the record that the Systems and Procedures Analysts do not actually require that knowledge of an advanced type normally acquired through prolonged study in an institution of higher learning.[16] Consequently, while these employees do possess skills and exercise judgment and initiative, I find them to be technical employees and not professionals within the meaning of Section 2(12) of the Act[17] as contended by the Employer.

I likewise find no merit to the Employer's contention that by virtue of the analysts' exposure to the payrolls for the Employer's management and professional personnel, which payroll segment they operate through the data processing machines,[18] they are excludable from the unit as confidential employees.[19] In *Dayton Power and Light Company*,[20] the Board ruled that programmers who attended

[15] See *Chrysler Corp.*, 154 NLRB 352; *Western Electric Corp.*, 126 NLRB 1346; *The Ryan Aeronautical Co.*, 132 NLRB 1160, where the Board held that in determining whether employees are professionals, the principal test depends not so much on the individual qualifications of each employee (i.e. education and training) as on the predominant character of the work in which they are engaged. It happens that in the instant case, according to above-cited precedent, the Systems and Procedures Analysts perform work and exercise responsibilities of personnel who have been found to be technical, not professional, employees.

[16] See footnote 8, *supra*.

[17] See footnote 3, *supra*.

[18] The record reveals that the regular data processing machine operators within the unit, run the balance of the payroll through the machines.

[19] See *B. F. Goodrich*, 115 NLRB 722, where confidential employees were defined as those who assist and act in a confidential capacity to officials who formulate, determine and effectuate policies in the field of labor relations.

[20] 137 NLRB 337, 339.

meetings with management at which the use of programming equipment was discussed in relation to programming management reports and policies, and who otherwise came into contact with labor cost and wage rate information were not confidential employees. It was noted there, as in the instant case, that these employees did not formulate policies as to those labor costs and wage rates. Accordingly, I do not find these employees to be confidential.

A closer question is presented as to whether, having failed to seek bargaining rights for these employees previously, the Petitioner may now do so by way of unit clarification. In this connection, I find some merit to the Petitioner's argument that the Systems and Procedures Analyst position did not it reach its present form until the Employer began to acquire and utilize computer equipment in 1961. Even if this were to be the case, however, more than one contract had been negotiated since then by the parties, during which negotiations, it appears, the Petitioner did not claim to represent or attempt to bargain for these employees.

In *Worthington Corporation, Compressor and Engine Division*,[21] the Board, in denying clarification of the unit so as to include systems and procedures analysts among other employees, took note that the petitioner in that case did not claim to represent or attempt to bargain for those employees during the contract negotiations subsequent to establishment of the positions in question. However, while this was a factor in the Board's determination in that case, it appears that the controlling consideration was the fact that employees sought to be included were found to be technical employees having job functions and responsibilities different from the employees in the clerical unit to which the Petitioner sought to accrete them.

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[21] 155 NLRB 222, 227.

Decision and Order Clarifying Bargaining Unit

In *Remington Rand Division of Sperry Rand Corporation*[22] data processing employees were accreted to a clerical unit by means of unit clarification. However, in that case the data processing department was established subsequent to the current contract and the employees in question had been unilaterally excluded by the employer from coverage of the contract. Nevertheless, it is noted that there the accretion was recognized by the Board even though no demand to represent the employees in question was made until two years after the execution of the latest collective bargaining agreement. In contrast to that finding, the Board in the same case held that a motion for clarification was not the proper method for adding coders to the certified unit, as the classification of coders was in existence prior to the consent election which gave rise to the certification of the unit and the union had made no effort to represent those employees until approximately three years after certification.

The Board's decision in *Radio Corporation of America*[23] is also relevant to the issue presented in this case. There, the Petitioner represented the Employer's technical employees pursuant to a certification in 1953. In 1958, the Employer established a new job classification of "engineering data processor" and not until 1963 did the Petitioner seek to include them in the technical unit. In that case the Board, without stating whether there had been intervening contracts (although such fact reasonably may be assumed), granted the Petitioner's motion for clarification, stating that, as the employees sought to be included had a close community of interest with the Employer's other technical employees, had their classification been in existence at the time of the original proceeding and certification it is clear that they would have been included as

[22] 132 NLRB 1093.
[23] 141 NLRB 1134.

part of such unit of technical employees. Thus, the Board stated: "Since it appears that they came into existence after the certified unit was established, we find upon all the fact in this case that they constitute an accretion to the existing unit.

Accordingly, while the diligence of the Petitioner in seeking inclusion of the disputed classifications through collective bargaining is clearly a relevant factor, it would appear that controlling weight should be given to the community of interest of the employees involved and only where the disputed jobs were in existence prior to certification of the unit in which they are sought to be included will the Board always require an election to resolve the issue.

As, in the instant case, the job classifications in question were established subsequent to the certification of the unit, it would appear from the foregoing that a motion for clarification is an appropriate vehicle for resolving the issue presented. However, even if greater weight were to be given to the fact that the parties entered into two contracts subsequent to the certification, in the negotiation of which the Petitioner did not pursue its claim to represent or bargain for these employees, certain factors mitigate against a contrary finding. Here, while the Petitioner might have been more vigorous in its attempt to secure bargaining rights for these employees, it is clear that their request for information concerning the duties and responsibilities of the employees involved, in both June and July of 1965, were met with no response from the Employer. As a matter of fact, no reply was made by the Employer until six months thereafter and that reply merely listed the names of the employees involved and their job title, followed by the statement that they were excluded by the language of the certification as "professional employees." Thus, it cannot be said that the Petitioner failed to demonstrate an interest in these employees prior to entering into the current col-

lective bargaining agreement or that it was clearly "sleeping on its rights" in this regard. To hold now that execution of the current collective bargaining agreement or the one that preceded it precludes unit clarification would ignore the attempts of the Petitioner to receive pertinent information and in effect would require it to defer the execution of a collective bargaining agreement affecting terms and conditions of employment for employees in the existing unit in order to perfect and preserve its claim to represent those employees it regards as an accretion to the unit. Such a result would not appear to effectuate the Board's desire to establish stable bargaining relationships.

In summary, on the basis of the entire record, including the showing therein of the special training and skills possessed by the Systems and Procedures Analysts "A" and "B" in the field of data processing and the independent judgment exercised by these employees in the process of choosing between alternative approaches in setting up their formats, I find that such employees are technical employees who fall within the scope of the existing certified unit.[24] Also, it is evidence that by reason of their technical functions and conditions of employment, these employees have a close community of interest with the other technical employees of the Employer, all of whom are in the existing unit of office, clerical and technical employees and, had their classification been in existence at the time of the original proceeding and certification, it is clear that they would have been included as part of the said unit. Since it appears that they came into existence after the certified unit was established, and under the circumstances above discussed, I find,

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[24] Cf. *The Dayton Power and Light Company, supra.*

upon all the facts in this case, that they constitute an accretion to the existing unit.[25]

B. *The Traffic Analysts*

As indicated above, the Petitioner also seeks clarification of the unit so as to include Traffic Analysts therein. The Employer likewise opposes this request.

The record reveals that Traffic Analysts select carriers and arrange outgoing shipments in circumstances not covered by the instruction manuals afforded the shipping clerks. They use independent judgment in solving problems involved in delays, damages or losses in transit, and are required to have thorough knowledge of all phases of the traffic field and to know the rate schedules of various common carriers as well as all pertinent governmental regulations. In relevant cases of transit loss, Traffic Analysts also institute claims on the Employer's behalf. They are supervised by the supervisor of the department of traffic and shipping control.

The Traffic Analyst "B" makes daily operating decisions, such as which carrier the Jersey City plant should utilize. The more experienced "A" Analyst, who shares an office with the "B" Analyst in Jersey City, and works in close conjunction with him, spends more time developing rate structures at the divisional level and doing analyses in this area. If one Analyst should be absent, the other will perform his responsibilities.

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[25] The Employer cited the *Worthington Corporation* case, 155, NLRB 222, in support of its position that unit clarification is inappropriate herein. However, *Worthington Corporation*, as to the issue of clarification is distinguished from the instant case in that the unit for which clarification was requested by the addition of engineering data processing personnel was strictly *clerical* in nature, as opposed to the *office*, clerical and *technical* unit in the instant case. In denying clarification, the Board in *Worthington*,

emphasized, *inter alia*, the differences in job function, responsibilities, initiative and judgment of the employees in the Engineering and Data Processing Office from that of the employees in the clerical unit and dismissed the petition. Here, the analysts may be added to the technical side of the existing unit.

It is undisputed in the record that the Employer's department of traffic and shipping control was created in 1945 and that Traffic Analysts have been employed within this department, performing essentially the same services since 1952. Thus, the positions of Traffic Analyst "A" and "B" were in existence at the time of the most recent certification. The Company currently employs one Traffic Analyst "A" and one Traffic Analyst "B".

As pointed out in the foregoing discussion, the Board has ruled that where a job classification was in existence at the time of a representation election, and was not then included in the balloting, the certified unit is definite in the exclusion of this classification to the extent, at least, that the relevant position cannot be thereafter regarded as an ambiguity or question as to the coverage of the certified unit. Such a matter can be resolved only by a representation petition and secret ballot.[26] Accordingly, I shall dismiss so much of the Petitioner's motion to clarify the certification as requests the inclusion of Traffic Analysts "A" and "B".

I shall therefore grant the Petitioner's motion to clarify the certification of International Union of Electrical, Radio and Machine Workers, Local 456, AFL-CIO, to include in the unit the Systems and Procedures Analysts "A" and "B" and I shall dismiss so much of the Petitioner's petition as relates to Traffic Analysts "A" and "B" since their inclusion raises a question concerning representation within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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[26] *Remington Rand, Division of Sperry Rand Corporation*, 132 NLRB 1093; *General Motors Corporation, Chevrolet Motor Division*, 117 NLRB 750.

Decision and Order Clarifying Bargaining Unit

ORDER

IT IS HEREBY ORDERED that the Petitioner's petition for clarification of its existing bargaining unit certified in Case No. 2-RC-8364,[27] be and it hereby is granted insofar as it relates to the inclusion of Systems and Procedures Analysts "A" and "B" in the said unit and;

IT IS FURTHER ORDERED that the Petitioner's motion insofar as it relates to Traffic Analysts "A" and "B", and it hereby is, denied.

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[27] 116 NLRB 1545.

Dated at Newark, New Jersey
this 18th day of October, 1967.

BERNARD L. BALICER
Bernard L. Balicer
Acting Regional Director
National Labor Relations Board
Twenty-second Region

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 34917 and 35073

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 456,

Intervenor.

Before:

LUMBARD, *Chief Judge,*

MOORE and SMITH, *Circuit Judges.*

THIS CAUSE came on to be heard upon a petition of Westinghouse Electric Corporation to review the order of the National Relations Board issued against Petitioner, its officers, agents, successors, and assigns on May 19, 1970, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 5, 1971, and has considered the briefs and transcript filed in this cause. On March 30, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Second Circuit that said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioner, Westinghouse Electric

Judgement

Corporation, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

It is Further Ordered that costs shall be taxed against Petitioner.

J. Edward Lumbard
Judge, United States Court of Appeals for the Second Circuit

J. Joseph Smith
Judge, United States Court of Appeals for the Second Circuit

Filed: April 26, 1971
A. Daniel Fusaro, *Clerk*
United States Court of Appeals
Second Circuit

Appendix B

34917, 35073

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 456, AFL-CIO,
Intervenor,

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by petitioner Westinghouse Electric Corporation and no active circuit judge* having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Henry J. Friendly
Chief Judge

* Judge Hays took no part in the consideration of this petition.

Filed: June 9, 1971
A. DANIEL FUSARO, *Clerk*
United States Court of Appeals
Second Circuit